EXAMINATION OF TITLE TO LAND.

IN England there are no lands not held strictly under "tenure," nor any proprietor, as the term is understood by us, except the monarch. In our own land we have adopted the same idea to the extent of holding all title to be derived through grant from the Crown or from chartered royal governments, prior to the Revolution, and later from the Federal or local governments,[1] but the tenure here, particularly since the imposition of succession taxes, is, technically, free and common socage in great part, though ownership is allodial, and to all intents and purposes absolute, and the liability to escheat still exists.

Estates tail and primogeniture have been, as such, very generally expressly abolished—in many States they have never existed—and the period of limitations somewhat modified; distinctions and invalidities in future estates, arising from the form of the instrument creating them or from the artificial relation of some prior or future estate, have been abolished where such estates are not in contravention of the one test rule governing a suspension of the power of alienation; and the highly artificial legal fictions constituting the English uses and trusts have been pared down (so far as the courts would allow) to a very simple system of legally enforceable beneficial interests, governed by the laws of their creation, equally regulating the legal estates of which they had formerly been but the shadows.

But tenancy, joint, and by the curtesy, dower, lease, mortgage, and other rights and incidents of ownership of land are retained; and the forms of devolution of title by descent, devise, voluntary conveyance and involuntary conveyance (by fiction of law), are still the same, with some modifications owing to the peculiarities of local law.

Freedom of alienation has always existed in this country, and simple forms of conveyance have been usual.

The common English form of conveyance, by lease and release, devised to avoid enrolment or the ancient livery

[1] 3 Kent's Com., 377, 378.

of seisin, though practicable, has never been popular here; and there has prevailed a form of deed in the nature of bargain and sale, with various additions in the nature of assurance, for a long time increasing in verbiage and volume, but later, by statutory enactment, as in the State of New York, much curtailed.

The registry or recording acts as they are generally known, have greatly varied if not diminished the labor of title examination, and but for their perhaps too great extension by the courts (as in the case of assignments of mortgage, which were not originally intended to come within the now extended scope of their operation) have proved perhaps the greatest practical innovation in the law of realty as derived from the mother country.

As respects competency to take and convey title changes have not been great, other than in regard to *femes coverts*, who have been generally, in the modern term, emancipated from their much deprecated classification with infants, lunatics, traitors, felons and the like, and in the cases of aliens and corporations, who—the one at first through a courtesy of nations, later through the growing brotherhood in rights of man; the other through considerations of business convenience—have almost if not quite acquired all the rights of the native-born individual.

In earlier days when the examination of titles first began to develop as a work of professional requirement in England, and to involve the employment of solicitors, and careful investigation of the various documents, possessions, claims and charges on which the title was founded or by which it might be effected or encumbered, one of the first acts of the examining solicitor was to call upon the solicitors of the vendor for an abstract of title, and also a statement of any documents affecting the title or any adverse claims or encumbrances with respect to the same, within their knowledge. Thus early was the attempt made to enforce what is known to us as the doctrine of representation; and, by a further extension of such inquiries to those supposed to have some adverse claim of title or encumbrance, the doctrine of estoppel was inaugurated. This doctrine was apparently extended to the point of binding even infants and *femes coverts;* but probably not to the ex-

tent of establishing an equitable system of transfer of title by these persons, who were expressly excluded from the rights of transfer. The theory was, however, carried so far as to preclude in some cases a mortgagee who, aware of the prospective purchase, stood by and gave no notice of his claim, from ever afterward enforcing it against the vendee. He was conclusively presumed to stand in the light of an accomplice in a fraud.

Further inquiries conducted upon the property itself, and with all persons found in occupancy were also customary. For judgments, decrees and the like, search was made in the places of registration provided in the courts for their docketing when intended to affect land, and in the court rolls, when the property was copy-hold.

It was sometimes considered proper to search, as at the Registry of Westminster, for *lis pendens*, and also for proceedings in bankruptcy and insolvency, annuities, and, in cases where the estate had been entailed or had belonged to married women, for enrolled deeds and acknowledgments.

Beyond these few simple precautions, coupled with the necessity of requiring production and delivery in the original of the various title deeds, but little was required as compared with the intricate system of title examination which has sprung up in America, where almost every property is always for sale, and the visitor greets his host with "What will you take?" and the customary reply is "What will you give?"

The end and aim towards which the examiner's whole effort tends is to satisfy his own judgment upon the ultimate question of the sufficiency of the title offered—its "marketability," as the set phrase seems to be.

It is generally conceded as an abstract proposition that, in the absence of express conditions of waiver or exception by contract, the purchaser is entitled to a good and marketable title. This is reasonable and logical as a primary proposition, for no man can be supposed willing to have agreed to take anything else, unless upon concessions necessarily in mind and which would naturally be expressed in the written agreement of purchase.

When we approach, however, the definition of market-

ability upon which so much depends, we meet with conflicting theories and decisions, as staggering to the mind as the sayings of a number of men all bent upon accord in a common object can well be. "The title should be such," says one, "that if he wish to sell he may be reasonably sure that no flaw or doubt will arise to disturb its market value,"[1] "or mortgageable to a person of reasonable prudence," says another;[2] again, "not to take a title when there is a defect in the record title, which can be cured only by a resort to parol evidence;"[3] or, "depending on a disputed question of fact or a doubtful question of law;"[2] and, "the burden of proof is on the vendor to show that the statute of limitations has cut off claims."[1] All these are broad enough to let out almost any purchaser on any title. On the other hand it is said that "a pending action does not of itself make the vendor's title defective * * * and the burden rests upon the vendee to prove the alleged cause of action;"[4] "if the defect or doubt * * * depends upon some extrinsic fact not discovered by the record, he must prove this fact to justify a refusal to accept the title;"[5] "there is no inflexible rule that a vendor must furnish a perfect record or paper title;"[6] "the burden of proof is on the purchaser to show that the title is defective;"[7] "the mere fact that sufficient time has not elapsed under the statute to protect * * * is held insufficient to justify rejection."[7]

From all these varying and often conflicting decisions as to marketability and as to the burden of proof, we are obliged to try to ascertain some reconciling principle; otherwise we shall be driven back almost upon a mere toss of chance, or the woman's reason, that the title is bad or good "because it is."

---

[1] Hatt *v.* Hagaman, 12 Misc., 171, citing Schriver *v.* Schriver, 86 N. Y., 575, *et al.*

[2] Fleming *v.* Burnham, 100 N. Y., 10.

[3] Moore *v.* Williams, 115 N. Y., 586.

[4] Simon *v.* Vanderveer, 84 Hun, 452; this case was reversed later (155 N. Y., 377), but for the time being was supposed to be law.

[5] Greenblatt *v.* Hermann, 144 N. Y., 13.

[6] Hillreigel *v.* Manning, 97 N. Y., 56.

[7] Moser *v.* Cochrane, 12 Daly, 292, aff'd, 107 N. Y., 35; Cambreling *v.* Purton, 125 N. Y., 610.

Perhaps a satisfactory test will be found in the suggestion that the subject be approached in each case from one of four points of view:

I. Where the vendee seeks to avoid.
II. Where the vendee seeks performance.
III. Where the vendor seeks to avoid.
IV. Where the vendor seeks performance.

But space forbids more than this hint as to the possible solution of these apparently conflicting illustrations of a simple and well-settled principle: another instance of the differings of law and equity!

In the recording acts lies the great point of the division between the old-time methods of examining title and the modern. The actual manual delivery of papers, their preservation intact, the several priorities among them, have been done away with or regulated in an orderly manner. At first glance, it would seem that these acts have multiplied the many risks involved in title examination; but this is in fact owing generally to the increased number of interests in land, made possible under the safeguarding of record.

As late as 1851, it is stated of the English laws relative to the public registry of legal instruments, that they were local and of very limited application, while among the United States the practice of record for the purpose of perpetuation existed as early as the colonial period; and in New York State priorities arising among recorded instruments were expressly regulated, certainly as early as 1788.

As already stated, the courts have greatly extended the intended scope of these acts, particularly in respect to inter-classical priorities—the statutes being planned originally to regulate the priorities of the several classes in themselves, and not with respect to various instruments of differing classification, in point of respective priority.

But the subject of priorities arising among recorded instruments of different classes, as well as between those recorded and unrecorded, is far too complex and voluminous to be more than mentioned in an article of general scope.

Besides these questions arising from the recording of instruments, there are different ones relating to the *status* and identity of the various persons concerned in passing down the title from hand to hand. Referring to the question of identity, the writer actually has known of a case where a title held by the wife of a man, in fee, was innocently passed along by a second wife of the same man, who had a similar given name but no title whatsoever to the property. And this undetected for a long period of years!

Questions of existing rights of dower left undisposed of by irregular divorce proceedings, attempted devolutions of title, through minors, aliens and lunatics, are of frequent occurrence. In the latter two classes, however, where legal proceedings sufficient to warn have not already transpired, purchasers without notice of the disqualification are very generally protected.

There are many matters also outside the records, and which are closely connected with or spring from, the very subject of the examination itself—the land. They are such as quantity, location of the lines, encroachments (all of which a competent survey will make clear), latent easements, such as rights of way, underground pipes, rights of support from adjacent building, occupation under claim adverse to the title as disclosed by the records or in modification of the same, unpaid water rates not yet written up, and others of less importance. It is but fair to say, however, that with these counsel rarely concern themselves, often not seeing the property at all, and leaving such matters to be looked up by the client or his surveyor, or neglected, as may be the case. It is claimed that the professional duty is limited in this respect to what the records may disclose—a wide departure from the English system.

Changes in decisions interpreting the law are a danger against which it is impossible to guard. An attorney is generally justified in relying on the decision of an appellate court, but the frequent reversals of the decisions of courts of first instance, render them very unsafe to rely upon. They may be used in sustaining one's own interpretation of the law, but if in conflict with it should only be regarded as warnings to make more certain the determination of the

point in doubt. It is not always that the court will save the title for the sake of conservatism and the great interests involved, though that almost appears to have been the motive in the New York case of Bertles *v.* Nunan,[1] where the demand for a logical determination of the question whether the statute had abolished estates by the entirety (as intimated in a *dictum* of the same court, in the earlier case of Meeker *v.* Wright),[2] was evaded, and the logic of the situation and the plain intent of the statute in question were cast aside to avoid uprooting the construction put upon that law and acted on by the majority of the legal advisers in real estate matters in the State. The same court overset many titles passed under the generally accepted rule laid down by a lower court of appeal in Wagner *v.* Hodge,[3] that a party defendant to a foreclosure suit was before the court in all his capacities or interests, duly cut off as such, by its decision of the later case of Landon *v.* Townshend,[4] holding exactly the reverse.

The irrepressible struggle between law and equity, for the long period of years during which they have flourished apart or in attempted combination, has been also one of the many sources of anxiety to the profession in the examination of title.

With numerous cases before us of adjudications that the set words "legal representatives" may be read "widow and heirs-at-law";[5] the frequent holding and statutory enactment that one of the most solemn instruments in the law, a deed under seal, may be read, in the light of parol evidence, as a mortgage;[6] that the same deed without a seal is only an enforceable contract in equity,[7] yet that the omission of the seal may be disregarded if the words "have hereunto set their hands and seals" precede the signatures;[8] that a mortgage will be construed one way if the

[1] 92 N. Y., 152.

[2] 76 N. Y., 262.

[3] 36 Hun, 524.

[4] 112 N. Y., 93.

[5] Greenwood *v.* Holbrook, 111 N. Y., 465; Griswold *v.* Sawyer, 125 N. Y., 411, *et al.*

[6] Vol. 1, R. S. N. Y., pp. 756, 93.

[7] Grandin *v.* Hernandez, 29 Hun, 399.

[8] Nesbit *v.* Albert, 85 Hun, 212.

appanage of a note,[1] and another if it secure a bond,[2] and be governed in an entirely different way still, if unaccompanied by either;[3] that a mortgage, once paid, may not be revived, though good money pass on the faith of it, as against even a subsequent encumbrancer having notice of its existence and presumed validity,[4] while a mortgage equally dead, and *ab initio*, for usury, is given life and validity to all time by an estoppel certificate[5]—with these and many similar conflicts in mind we are forced back again very sternly into the narrow path of precedent, and to a rigid holding fast to what has been once surely determined, even though the straw be one likely to break or to be torn from the grasp.

It is a legal maxim, that "No will has its brother." Human nature having much that is common to all persons yet asserts its individuality in giving to each person with respect to his estate a will of his own; to each is given his own environment, his own duties, his own preferences and his own ideas with regard to his estate—to distribute it or to perpetuate it. So in regard to real estate titles, made up of wills, of deeds, of equity suits, of passings by descent, no title to real estate has its brother. And no lawyer in active practice can choose the particular real estate title which he will examine, or the particular real estate transaction which he will carry through; he takes what his client sends him. He must be familiar with the whole range of applied real estate law (in his own State at least); with the broad principles as contained in Blackstone and Kent; with the legislation which reiterates those principles or modifies them, or adapts them to later times, or to fit in with other legislation; must know how to weigh the numerous and often conflicting decisions which sustain, modify or overturn these principles, adapt them to subsequent legislation, or distinguish between different and seemingly opposing principles; must be familiar with the practice of the courts as to the manner in which the object

[1] Franklin Bank *v.* Pratt, 31 Me., 501; Gould *v.* March, 1 Hun, 566.
[2] Kidd *v.* Conway, 65 Barb., 158.
[3] Matthews *v.* Sheehan, 69 N. Y., 585.
[4] Bogert *v.* Bliss, 148 N. Y., 194.
[5] Weyh *v.* Bohlan, 85 N. Y., 394.

sought can be legally accomplished, examining with great care for jurisdictional questions, or the following of particular statutes, where the matter is governed by statute rather than by common law. He must decide, sometimes quickly, and always correctly, all these questions; as to some of which he may rely safely—or to his cost—upon decisions which are "on all fours," supposedly, with his case; in regard to others using only his own judgment, as in questions of first impression, or involving recent legislation, where there is no decision to aid him, and where too often, in cases of crude legislation, he is called to be the pioneer for others over a path which is full of danger. If an existing decision is not "on all fours" with his case he must quickly and correctly anticipate the Court in its construction of the law. He must be broad, yet having a mind for detail; must be careful but not finical; he must be trustworthy, "not given to disputations," thoroughly conversant with the title which he is examining or has examined, and not dependent upon others for the details. He must be a good business man, quick and correct at figures, a student of men as well as of books; starting no questions of casuistry against his clients' interests, not desirous of airing his learning, nor of setting up even the most innocent-looking "man of straw," in a display argument about what he believes to be an immaterial point against his client's side of the case. In short, he must be an equity judge off the bench and out of court, anticipating a judge's decision, sometimes sitting in review even upon the acts of his brother on the bench, ever responsible in loss of practice, and in many ways in which a judge is not, for errors of judgment; and even so he must rely for many facts, as of descent, intestacy, freedom from dower, etc., upon the knowledge of others. He has no light task; he assumes a heavy burden of responsibility.

In early days questions of title were first adjudicated *vi et armis*, next in time by the arbitrament of twelve good men and true on either side—a step from the tourney toward the jury, and savoring of both, in the process of evolution. Then followed the courts of law in the modern acceptance of the term, with their bills, cross-bills, replications and the interminable proceedings in ejectment, drag-

ging through years and through lifetimes—estates in chancery were never dependent on lives!

In the present day the examining attorney must be all that I have said, and more. It is not alone a responsibility to make good his determination before a court—it is rare that he can hope for a fair chance of that sort to defend his work. The old-fashioned ejectment suit, tried and retried, with all the varying views of different justices and courts, changes of circumstance and fact, often occuring in the lapse of time taken up in the trials, and which tossed victory first to one side, then to the other, has gone practically into history. It is the view which the next attorney, following in his footsteps, will take, that "gives him pause"—often an attorney examining for a mortgage loan, and who decides for himself upon the goodness and marketability of the title before him.

Possibly nowhere outside of the profession of arms, where conduct becoming an officer and a gentleman is a subject of every one's individual and collective concern, is there a professional, unofficial court maintaining a critical standard of excellence like that of the *excoram forum* which is composed of members of the legal profession who devote themselves particularly to the intricacies of real estate law and the examination of titles. Not once in ten, perhaps, will a mooted point become the subject of judicial decision—no class of men are more hide-bound in precedent, or more ready to discuss and settle such points among themselves without resort to the courts. A man is greatly upheld, or discouraged, and even often completely overborne, by a very general custom or the consensus of opinion of brother specialists. This arises, very generally, from the fact that clients lack time and courage, or that the circumstances of the case will not permit a resort to the courts. A few adverse comments on the point involved by some specialists consulted on the curbstone, as it were, by the client in question, or the rejection of a title by an irresponsible counsel who is examining for a loan, without the possibility of vindication by a "day in court," may lose one his client forever.

It is this very necessity for almost infallible accuracy that lends peculiar responsibilty to the *ipse dixit* of the real

estate counsel. He can afford to make no mistakes. The seeds of error, sown by him, never fail to spring up in a crop of calamity. It has been said, "The grave conceals many mistakes of the physician, but nothing can prevent the error of an attorney in an examination of title from eventually springing up to confront him—save an early death."

It is not the purpose of the writer to discourage, but to make careful painstaking the every-day and all-day-long rule of him who aspires to pass upon a title to land, so that his certificate of title will *go* in cases whose importance may reach far beyond the limit of the capital of a title insurance company, or even of them all in combination.

EDGAR LOGAN.

NOTE.—For the purpose of illustration, the cases in reference in this article have been very generally confined to those in the courts of New York State. Decisions of courts of different States have been always very generally in hopeless conflict.